



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

BACKGROUND

On February 6, 2008, Plaintiffs filed this putative class action on behalf of themselves and all similarly situated persons who are the owners of homes in which Defendants' gas fireplaces are installed. According to Plaintiffs' complaint, Defendants distributed and sold the gas fireplaces.

Plaintiffs allege that Defendants sold the fireplaces with the specific intention of having builders install them in homes throughout the United States. Compl. at 14. By selling the fireplaces, Defendants represented to consumers that they were "safe, of mercantile quality, and fit for their intended and reasonably foreseeable uses, and with sufficient protections and warnings regarding potential dangers and hazards which reasonable consumers would expect and assume to be provided in order to make a decision whether to purchase the fireplace or a home installed with the fireplace." Compl. at 14.

Plaintiffs further allege that Defendants failed to disclose or concealed the fact that the fireplaces are dangerous and unsafe given that the unguarded single pane glass-sealed front may reach temperatures in excess of 350 degrees Fahrenheit, which may cause third degree burns to skin contacting the glass. Compl. at 15. Lastly, Plaintiffs allege that because of Defendants' conduct and omissions in the last ten years, members of the putative class came to own residential homes in which the fireplaces were installed. Compl. at 16.

LEGAL STANDARD

A complaint must contain a "short and plain statement of the

1 claim showing that the pleader is entitled to relief." Fed. R.  
2 Civ. P. 8(a). When considering a motion to dismiss under Rule  
3 12(b)(6) for failure to state a claim, dismissal is appropriate  
4 only when the complaint does not give the defendant fair notice of  
5 a legally cognizable claim and the grounds on which it rests. Bell  
6 Atl. Corp. v. Twombly, \_\_ U.S. \_\_, 127 S. Ct. 1955, 1964 (2007).

7 In considering whether the complaint is sufficient to state a  
8 claim, the court will take all material allegations as true and  
9 construe them in the light most favorable to the plaintiff. NL  
10 Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).

11 Although the court is generally confined to consideration of the  
12 allegations in the pleadings, when the complaint is accompanied by  
13 attached documents, such documents are deemed part of the complaint  
14 and may be considered in evaluating the merits of a Rule 12(b)(6)  
15 motion. Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th  
16 Cir. 1987).

17 When granting a motion to dismiss, the court is generally  
18 required to grant the plaintiff leave to amend, even if no request  
19 to amend the pleading was made, unless amendment would be futile.  
20 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911  
21 F.2d 242, 246-47 (9th Cir. 1990). In determining whether amendment  
22 would be futile, the court examines whether the complaint could be  
23 amended to cure the defect requiring dismissal "without  
24 contradicting any of the allegations of [the] original complaint."  
25 Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990).

26 Leave to amend should be liberally granted, but an amended  
27 complaint cannot allege facts inconsistent with the challenged  
28

1 pleading. Id. at 296-97.

2 DISCUSSION

3 I. CLRA Notice Requirements

4 Defendants argue that Plaintiffs have not satisfied the CLRA  
5 pre-litigation notice requirements. Plaintiffs do not dispute that  
6 they failed to provide Defendants with written notice of the claims  
7 they bring on behalf of themselves and a purported nation-wide  
8 class. Rather, Plaintiffs contend that their attorneys' compliance  
9 with the notice requirements in a previous state-wide class action,  
10 Fields v. Superior Fireplace Co., et al., filed in California  
11 superior court on March 1, 2007, is sufficient for notice in this  
12 case because it included the same alleged violations of the CLRA  
13 and demanded that the same Defendants either remove and replace the  
14 fireplaces or adequately retrofit them. Dec. of Kirk J. Wolden,  
15 Exhibit A.

16 Under the CLRA, thirty days or more prior to the commencement  
17 of "an action for damages," the consumer shall notify the defendant  
18 of the particular alleged violations of § 1770, and demand that the  
19 defendant correct, repair, replace, or otherwise rectify the goods  
20 or services alleged to violate § 1770. Cal. Civ. Code  
21 § 1782(a)(1). The notice must be in writing and must be sent by  
22 certified or registered mail, return receipt requested. Cal. Civ.  
23 Code § 1782(a)(2).

24 The CLRA's notice requirement is not jurisdictional, but  
25 compliance with the requirement is necessary to state a claim.  
26 Outboard Marine Corp. v. Superior Court, 52 Cal. App. 3d 30, 40-41  
27 (1975). "[T]he clear intent of the [CLRA] is to provide and

1 facilitate pre-complaint settlements of consumer actions wherever  
2 possible and to establish a limited period during which such  
3 settlement may be accomplished." Id. at 41; Laster v. T-Mobile  
4 USA, Inc., 407 F. Supp. 2d 1181, 1195-96 (S.D. Cal. 2005)  
5 (describing statutory policy of fostering early settlement of  
6 disputes). A "literal application of the notice provisions" is the  
7 only way to accomplish the CLRA's purposes. Outboard Marine, 52  
8 Cal. App. 3d at 41.

9 Plaintiffs do not explain how notice of the Fields litigation  
10 would have facilitated pre-complaint settlement in this case.  
11 Without notice that they were being sued by a nation-wide class of  
12 consumers, with Kirk and Kolleen Keilholtz as the class  
13 representatives, Defendants could not have settled with them before  
14 the complaint was filed. Therefore, Plaintiffs' failure to give  
15 Defendants notice of this particular lawsuit did not facilitate  
16 pre-complaint settlement, which is contrary to the spirit and  
17 purpose of the CLRA notice requirements. Compliance with the  
18 notice requirements in Fields, therefore, is not sufficient for  
19 notice of this case. Because Defendants were not on notice of the  
20 current lawsuit, Plaintiffs' demand for damages is premature.

21 However, an action for "injunctive relief" brought under  
22 § 1770 may be commenced without compliance with the notice  
23 requirements. Cal. Civ. Code § 1782(d). If a complaint seeks only  
24 injunctive relief, not less than thirty days after it has been  
25 filed and, after compliance with the thirty day notice requirement  
26 under § 1782(a), the consumer may amend the complaint without leave  
27 of the court to include a request for damages. Cal. Civ. Code

1 § 1782(d).

2 Courts have reached different conclusions as to whether a  
3 premature claim for damages under the CLRA requires dismissal with  
4 or without prejudice. In Deitz v. Comcast Corp., 2006 WL 3782902,  
5 \*5 (N.D. Cal.), the plaintiff failed to provide notice of a CLRA  
6 claim that sought injunctive relief and damages. The court  
7 dismissed the damages claim without prejudice on the ground that  
8 the legislature specifically contemplated that an action seeking  
9 injunctive relief could be amended to include a damages claim after  
10 the thirty-day notice period had run. Id. at \*6. On the other  
11 hand, in Laster, 407 F. Supp. 2d at 1195-96, the court dismissed a  
12 CLRA damages claim with prejudice for failing to comply with notice  
13 requirements, citing Outboard Marine, 52 Cal. App. 3d at 40-41,  
14 which held that strict application of the notice requirement was  
15 necessary to achieve the goal of pre-litigation settlement. In  
16 Cattie v. Wal-Mart Stores, Inc., 504 F. Supp. 2d 939, 950 (S.D.  
17 Cal. 2007), the court relied on Outboard Marine and Laster to  
18 dismiss a premature damages claim with prejudice.

19 The Court is persuaded by the reasoning in Deitz.  
20 Accordingly, Plaintiffs' CLRA claim for damages is dismissed  
21 without prejudice. Plaintiffs may proceed with their claim for  
22 injunctive relief, and may move for leave to amend their complaint  
23 to include a request for damages once they are able to show  
24 compliance with § 1782(d) and the thirty day notice period.

25 II. CLRA Transaction Requirement

26 Defendants argue that Plaintiffs fail to state a CLRA claim  
27 because they do not allege that Defendants engaged in a transaction  
28

1 directly with consumers; rather they allege that Defendants sold  
2 the fireplaces to homebuilders, who then sold homes containing the  
3 fireplaces to individuals. Plaintiffs respond that a CLRA action  
4 does not require direct privity between the consumer and the  
5 manufacturer.

6 The CLRA makes unlawful "unfair methods of competition and  
7 unfair or deceptive acts or practices undertaken by any person in a  
8 transaction intended to result or which results in the sale or  
9 lease of goods or services to any consumer." Cal. Civ. Code  
10 § 1770(a). The CLRA broadly defines "transaction" as "an agreement  
11 between a consumer and any other person, whether or not the  
12 agreement is a contract enforceable by action, and includes the  
13 making of, and the performance pursuant to, that agreement." Cal.  
14 Civ. Code § 1761(e). The CLRA provides that it should be liberally  
15 construed and applied to promote its underlying purposes, which are  
16 to protect consumers against unfair and deceptive business  
17 practices and to provide efficient and economical procedures to  
18 secure such protection. Cal. Civ. Code § 1760.

19 Defendants fail to cite any authority to support the  
20 proposition that a CLRA claim can be asserted only against  
21 defendants who sell goods or services directly to consumers.  
22 Plaintiffs' allegations that Defendants sold the fireplaces to home  
23 builders, who installed them in homes, resulting in their sale to  
24 Plaintiffs, is sufficient to allege that Defendants entered into a  
25 transaction which was "intended to result or which result[ed] in  
26  
27  
28

1 the sale" of goods to a consumer.<sup>1</sup> See Cal. Civ. Code § 1770(a).  
2 Because Plaintiffs satisfy the transaction requirement, the Court  
3 denies Defendants' motion to dismiss Plaintiffs' CLRA claim on this  
4 ground.

5 III. Unjust Enrichment

6 Defendants argue that Plaintiffs cannot maintain a claim for  
7 unjust enrichment because, under California law, there is no such  
8 cause of action. Plaintiffs argue that there is a cause of action  
9 for unjust enrichment under California law.

10 California courts appear to be split on whether there is an  
11 independent cause of action for unjust enrichment. Baggett v.  
12 Hewlett-Packard Co., 582 F. Supp. 2d 1261, 1270-71 (C.D. Cal. 2007)  
13 (applying California law). One view is that unjust enrichment is  
14 not a cause of action or a remedy, but a general principle  
15 underlying various legal doctrines and remedies. McBride v.  
16 Boughton, 123 Cal. App. 4th 379, 387 (2004). In McBride, the court  
17 construed a "purported" unjust enrichment claim as a cause of  
18 action seeking restitution. Id. There are at least two potential  
19 bases for a cause of action seeking restitution: (1) in lieu of  
20 breach of contract damages when the parties had a contract which  
21 was procured by fraud or is unenforceable for some reason; and (2)  
22 where the defendant obtained a benefit from the plaintiff by fraud,  
23 duress, conversion, or similar conduct and the plaintiff chooses  
24 not to sue in tort but to seek restitution on a quasi-contract  
25 theory. Id. at 388. In the latter case, the law implies a

---

26  
27 <sup>1</sup>Defendants' request for judicial notice of their demurrer in  
the Fields case is denied as unnecessary.



1 contract, or quasi-contract, without regard to the parties' intent,  
2 to avoid unjust enrichment. Id.

3 Another view is that a cause of action for unjust enrichment  
4 exists and its elements are receipt of a benefit and unjust  
5 retention of the benefit at the expense of another. Lectrodryer v.  
6 SeoulBank, 77 Cal. App. 4th 723, 726 (2000); First Nationwide  
7 Savings v. Perry, 11 Cal. App. 4th 1657, 1662-63 (1992).

8 Plaintiffs' third cause of action alleges that Defendants have been  
9 unjustly enriched, to the detriment of and at the  
10 expense of the class members, as a result of its unlawful  
11 and/or wrongful pattern of conduct directed against the  
12 class as a whole and its resulting collection of money  
13 from the sale of hazardous fireplaces. Defendants have  
14 unjustly benefitted through the unlawful and/or wrongful  
15 collection of money from the sale of hazardous  
16 fireplaces, and continue to so benefit to the detriment  
17 and at the expense of class members. Accordingly,  
18 Defendants should not be allowed to retain the proceeds  
19 from the benefits conferred upon it by the class members,  
20 who seek disgorgement of Defendants' unjustly acquired  
21 profits and other monetary benefits resulting from its  
22 unlawful conduct, in an equitable and efficient fashion  
23 to be determined by the Court.

24 Complaint at ¶¶ 38-41.

25 Whether Plaintiffs' unjust enrichment cause of action is  
26 construed as a claim for restitution as in the McBride case or is  
27 considered to be an independent cause of action as in the  
28 Lectrodryer and First Nationwide cases, the allegations are  
sufficient to state a claim under California law. Although this  
claim may ultimately be superfluous to Plaintiffs' restitution  
claim under the UCL, it is inappropriate at this early stage in the  
litigation to determine whether other remedies available to  
Plaintiffs are adequate. Accordingly, Defendants' motion to  
dismiss Plaintiffs' third cause of action is DENIED.

1 IV. Federal Rule of Civil Procedure 9(b)

2 Defendants argue that Plaintiffs' UCL, CLRA and unjust  
3 enrichment claims sound in fraud because they allege that  
4 Defendants misrepresented, failed to disclose or falsely advertised  
5 the risks associated with the fireplaces. Defendants claim that  
6 Plaintiffs have not plead these claims with the requisite  
7 particularity under Rule 9(b). Plaintiffs respond that the  
8 pleading standard for fraud is lower under the UCL than under the  
9 common law tort of fraud and, in any case, they have plead their  
10 UCL, CLRA and unjust enrichment claims with sufficient  
11 particularity.

12 "In all averments of fraud or mistake, the circumstances  
13 constituting fraud or mistake shall be stated with particularity."  
14 Fed. R. Civ. P. 9(b). The allegations must be "specific enough to  
15 give the defendants notice of the particular misconduct which is  
16 alleged to constitute the fraud charged so that they can defend  
17 against the charge and not just deny that they have done anything  
18 wrong." Semegen v. Weidner, 780 F.2d 727, 731 (9th Cir. 1985).  
19 Statements of the time, place and nature of the alleged fraudulent  
20 activities are sufficient provided the plaintiff sets forth "what  
21 is false or misleading about a statement, and why it is false." In  
22 re GlenFed, Inc., Sec. Litig., 42 F.3d 1541, 1548 (9th Cir. 1994);  
23 Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1439 (9th Cir.  
24 1987). "Averments of fraud must be accompanied by 'the who, what,  
25 when, where, and how' of the misconduct charged." Vess v.  
26 Ciba-Geigy Corp. USA, 317 F.3d 1097, 1101, 1106 (9th Cir. 2003).  
27 Scierter may be averred generally, simply by saying that it

1 existed. In re GlenFed, Inc., Sec. Litig., 42 F.3d at 1547; Fed.  
2 R. Civ. P. 9(b) (malice, intent, knowledge, and other mental states  
3 may be averred generally). As to matters peculiarly within the  
4 opposing party's knowledge, pleadings based on information and  
5 belief may satisfy Rule 9(b) if they also state the facts on which  
6 the belief is founded. Wool, 818 F.2d at 1439.

7 Fraud can be averred by specifically alleging it as such, or  
8 by alleging facts that necessarily constitute fraud even if the  
9 word "fraud" is not used. Id.

10 The UCL prohibits any "unlawful, unfair or fraudulent business  
11 act or practice." Cal. Bus. & Prof. Code § 17200. The CLRA  
12 prohibits "unfair methods of competition and unfair or deceptive  
13 acts or practices." Cal. Civ. Code § 1770. Fraud is not an  
14 essential element either of a CLRA or a UCL claim. Vess, 317 F.3d  
15 at 1104-1105.

16 Plaintiffs' allegation that Defendants' conduct was unfair  
17 within the meaning of the UCL does not sound in fraud and must only  
18 satisfy the ordinary notice pleading standards. However,  
19 Plaintiffs also allege that Defendants "engaged in fraudulent  
20 conduct" under the UCL and the CLRA and in their claim for unjust  
21 enrichment. The essential elements of fraud are encompassed in the  
22 allegations that Defendants "falsely represented the risks, dangers  
23 and defects and disadvantages," through advertising or failure to  
24 disclose; Defendants knew their fireplaces were not safe or usable  
25 for their intended purpose and intentionally, recklessly, or  
26 negligently concealed, suppressed, omitted and misrepresented this  
27 fact; Plaintiffs purchased homes with the fireplaces based on their  
28

1 reliance on Defendants' conduct or omissions; and Plaintiffs lost  
2 money and suffered monetary damages as a result. Complaint at  
3 ¶¶ 14-16, 22-23, 30, 38.

4 To the extent that Plaintiffs' claims under the CLRA, UCL and  
5 unjust enrichment allege fraud, they are not plead with the  
6 necessary particularity. Plaintiffs allege that Defendants  
7 intended to deceive the nation-wide class through advertising,  
8 promoting, marketing, selling and distribution, but fail to plead  
9 when Defendants made or failed to make the statements complained  
10 of, where Defendants made the statements, and why the statements  
11 were false or misleading.

12 Thus, to the extent Plaintiffs' claims are based on fraud,  
13 they are dismissed with leave to amend.

#### 14 V. Statute of Limitations

15 The parties agree that a four-year and three-year statute of  
16 limitations applies to claims brought under the UCL and CLRA  
17 respectively and Plaintiffs do not dispute that the statute of  
18 limitations for an unjust enrichment claim is three years.  
19 However, the parties dispute whether the time limits should be  
20 tolled under the delayed discovery rule or, alternatively, under  
21 the principle of fraudulent concealment.

#### 22 A. Delayed Discovery Rule

23 Plaintiffs argue that their claims are based on allegations of  
24 failure to disclose, and that they are therefore amenable to the  
25 delayed discovery rule.

26 Although generally a cause of action accrues when all of its  
27 elements accrue, the delayed discovery rule postpones accrual until

28

1 the plaintiff discovers, or has reason to discover, the cause of  
2 action. Grisham v. Philip Morris U.S.A., Inc., 40 Cal. 4th 623,  
3 741, 742 (2007). A plaintiff has reason to discover a cause of  
4 action when he or she "has reason at least to suspect a factual  
5 basis for its elements." Id. at 742. "Under the discovery rule,  
6 suspicion of one or more of the elements of a cause of action,  
7 coupled with knowledge of any remaining elements, will generally  
8 trigger the statute of limitations period." Fox v. Ethicon  
9 Endo-Surgery, Inc., 35 Cal. 4th 797, 806-807 (2005).

10 To invoke the delayed discovery rule, the plaintiff must plead  
11 facts showing: "(a) Lack of knowledge. (b) Lack of means of  
12 obtaining knowledge (in the exercise of reasonable diligence the  
13 facts could not have been discovered at an earlier date). (c) How  
14 and when he did actually discover the fraud or mistake." General  
15 Bedding Corp. v. Echevarria, 947 F.2d 1395, 1397 (9th Cir. 1991)  
16 (applying California law). Under this rule, when the plaintiff has  
17 notice or information of circumstances that would put a reasonable  
18 person on inquiry notice, or has the opportunity to obtain  
19 knowledge from sources open to his or her investigation, the  
20 statute commences to run. Id.

21 The delayed discovery rule is typically employed when the  
22 defendant is in a far superior position to know of the act and the  
23 injury, and the act and the injury are difficult for the plaintiff  
24 to detect. Prudential Home Mortgage Co. v. Superior Court, 66 Cal.  
25 App. 4th 1236, 1246-47 (1998); Gryczman v. Pico Partners, Ltd., 107  
26 Cal. App. 4th 1, 5 (2003).

27 Because the delayed discovery rule does not apply to actions  
28

1 brought under the UCL, Snapp & Assocs. Ins. Servs., Inc. v.  
2 Robertson, 96 Cal. App. 4th 884, 891 (2002); Karl Storz Endoscopy  
3 America, Inc. v. Surgical Technologies, Inc., 285 F.3d 848 (9th  
4 Cir. 2002), the Court will only consider whether it applies to  
5 Plaintiffs' CLRA and unjust enrichment claims.

6 Plaintiffs allege that other manufacturers design and sell  
7 safer fireplaces, and that Defendants' fireplaces are unsafe and  
8 may cause third degree burns. However, Plaintiffs have failed to  
9 plead facts regarding their lack of knowledge of Defendants'  
10 alleged fraud, lack of the means to discover the alleged fraud,  
11 exercise of reasonable diligence in investigating the alleged  
12 fraud, or when the alleged fraud was actually discovered.  
13 Plaintiffs' opposition is also silent in this regard. Thus,  
14 Plaintiffs have not alleged sufficient facts to establish that the  
15 discovery rule applies.

16 "A close cousin of the discovery rule is the well accepted  
17 principle of fraudulent concealment." Bernson v. Browning-Ferris  
18 Indus. of California, Inc., 7 Cal. 4th 926, 931 (1994). "The rule  
19 of fraudulent concealment is applicable whenever the defendant  
20 intentionally prevents the plaintiff from instituting suit . . ."  
21 Id. at 931, n.3. "In order to establish fraudulent concealment,  
22 the complaint must show: (1) when the fraud was discovered; (2) the  
23 circumstances under which it was discovered; and (3) that the  
24 plaintiff was not at fault for failing to discover it or had no  
25 actual or presumptive knowledge of facts sufficient to put him on  
26 inquiry." Baker v. Beech Aircraft Corp., 39 Cal. App. 3d 315, 321  
27 (1974). "In urging lack of means of obtaining knowledge, it must  
28

1 be shown that in the exercise of reasonable diligence the facts  
2 could not have been discovered at an earlier date." Id.

3 Plaintiffs' complaint fails to allege when the fraud was  
4 discovered, the circumstances under which it was discovered, and  
5 that they were not at fault for failing to discover it or had no  
6 actual or presumptive knowledge of facts sufficient to put them on  
7 inquiry. Plaintiffs therefore fail to allege sufficient facts to  
8 invoke tolling based on fraudulent concealment.

9 Plaintiffs' CLRA claims arising outside of the three-year  
10 statute of limitations, UCL claims arising outside of the four-year  
11 statute of limitations, and unjust enrichment claims arising  
12 outside of the three-year statute of limitations are dismissed  
13 without prejudice. The Court grants Plaintiffs leave to amend  
14 their complaint.

15 CONCLUSION

16 The Court GRANTS, in part, Defendants' motion to dismiss.  
17 Defendants' motion to dismiss Plaintiffs' claim arising under the  
18 doctrine of unjust enrichment and Plaintiffs' CLRA claim based on  
19 failure to allege that Defendants engaged in a transaction are  
20 DENIED. Plaintiffs' CLRA claim for damages is dismissed without  
21 prejudice; Plaintiffs may proceed with their claim for injunctive  
22 relief, and may move to amend their complaint to include a request  
23 for damages once they are able to show compliance with California  
24 Civil Code § 1782(d) and the thirty-day notice period. Plaintiffs'  
25 claims sounding in fraud and arising outside of the statute of  
26 limitations are dismissed with leave to amend. Plaintiffs' CLRA  
27 claim for injunctive relief and the UCL and CLRA claims not

28

1 sounding in fraud may proceed. If Plaintiffs wish to file an  
2 amended complaint, they must do so within forty-five days from the  
3 date of this order. If Plaintiffs do not file an amended complaint  
4 within this time period, their remaining claims will proceed.

5  
6 IT IS SO ORDERED.

7  
8 Dated: 3/30/09



9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  

---

CLAUDIA WILKEN  
United States District Judge